Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

ALFRED JANIGA,

Petitioner,

v.

QUESTAR CAPITAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit erred in ruling that Petitioner's act of signing one page of a five page new client account application objectively demonstrated his assent to an arbitration provision contained on another page regardless of whether he was ever provided a copy of the other pages of the application, including the entire arbitration agreement, thus resulting in Petitioner's unknowing waiver of his Seventh Amendment right to a trial by jury?

PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Seventh Circuit:

The Petitioner here and Appellee below is Alfred Janiga.

The Respondent here and appellant below is Questar Capital Corporation.

Hessek Financial Services, LLC and Wieslaw Hessek were additional appellants below but are not parties to this Petition.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 615 F.3d 735 (7th Cir. 2010) and available at 2010 WL 3023945 and is reprinted in the Appendix to the Petition ("Pet. App."). The District Court's oral opinion is not reported but the relevant portions are reprinted at Pet. App. B – 18a-20a.

JURISDICTION

The Court of Appeals entered its judgment on August 2, 2010. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

This case also involves provisions of the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* The pertinent provisions are reproduced at Pet. App. C – 21a-24a.

STATEMENT OF THE CASE

Petitioner Alfred Janiga ("Janiga") is a Polish immigrant whose natural and primary language is Polish. Janiga has no securities experience and limited knowledge of securities and investing.

Over the course of two years, Wieslaw Hessek ("Hessek"), a licensed securities broker, repeatedly solicited Janiga to allow Hessek to invest Janiga's money. Hessek and Janiga are brothers. All conversations between Janiga and Hessek were in the Polish language. Hessek, being Janiga's brother, knows Janiga cannot read English fluently without assistance or a translator and knows Janiga can speak and understand limited English.

In March, 2008, Janiga agreed to invest his money with Hessek, Respondent Hessek Financial Services, LLC ("Hessek Financial") and Respondent Questar Capital Corporation ("Questar"). Hessek is a securities broker and does business through his company, Hessek Financial. Hessek's client brokerage accounts are set up and maintained by Questar. All securities trades initiated by Hessek are processed and executed by Questar as the broker-dealer.

Hessek told Janiga, in Polish, he would take care of everything with regards to setting up an investment account for Janiga's money. Hessek told Janiga all he needed was for Janiga to sign "a piece of paper." The signature page Janiga signed was on the third page of a five page document. Contrary to Hessek's representations, the document is composed of three

parts: a "New Account Form" requiring personal information, a "Client Agreement" and a "Questar Sponsorship Program Disclosure." (The New Account Form, Client Agreement and Sponsorship Program Disclosure are referred to collectively herein as the "Application.") A signature line is only provided at the conclusion of the New Account Form and not in the Client Agreement nor in the Sponsorship Program Disclosure. Hessek then took the single piece of paper without giving a copy of it or anything else to Janiga. At no time up to the filing of the Complaint in the District Court had Hessek, or anyone at Hessek Financial or Questar, ever given Janiga a copy of the Application containing the arbitration clause or allowed him to view the Application containing the arbitration clause. Janiga asked Hessek numerous times for a copy of the documents he signed. Hessek promised each time to send copies but never followed through on such promises.

Further, at no time did Hessek ever inform Janiga, orally or in writing, of any terms of the Application including the existence or meaning of an arbitration agreement. To date, no evidence has been proffered by Questar, Hessek or Hessek Financial that any of them or their employees tendered a copy of any part of the Application to Janiga (or otherwise revealed to Janiga any terms of the Application), especially any arbitration agreement, prior to the filing of the Complaint in the District Court.

When Questar filed its Memorandum of Law in Support of its Motion to Stay Proceedings and Compel Arbitration with the District Court, it contained a full

copy of the alleged agreement between the parties, Janiga and his counsel learned for the first time what document Janiga had in fact signed and the purported terms therein.

On April 23, 2009, Janiga filed a six count Complaint against Hessek, Hessek Financial and Questar claiming (i) violations of the Securities Exchange Act of 1934, (ii) negligence, (iii) breach of fiduciary duty, (iv) common law fraud, (v) excessive trading and churning of investment account and (vi) violations of the Illinois Fraud and Deceptive Business Practices Act. Instead of filing an Answer in the case, on May 20, 2009, Questar filed a Motion to Dismiss or, in the Alternative, Motion to Stay Proceedings and Compel Arbitration claiming that Janiga's claims are subject to mandatory arbitration through the Financial Industry Regulatory Authority ("FINRA") by virtue of his signing page three of the Application and thus binding Janiga to the arbitration agreement clause in the Client Agreement portion of the Application. Hessek and Hessek Financial made the same argument through their Motion to Compel Arbitration filed on June 10, 2009. On July 10, 2009, the District Court denied Questar's, Hessek's and Hessek Financial's Motions to Stay Proceedings and Compel Arbitration on the grounds that since no consent existed between the parties as to the terms of the document., Janiga was not bound to the arbitration agreement contained in the document.

Questar appealed such ruling by filing a Notice of Appeal on August 7, 2009. Hessek and Hessek Financial also appealed the ruling of the District Court by filing a Notice of Appeal on August 20, 2009. The appeals of

Questar and Hessek were consolidated on August 25, 2009. The Seventh Circuit's decision was entered on August 2, 2010. The Court reasoned that Janiga's act of signing one page of the Application objectively demonstrated his assent to the arbitration agreement contained on another page regardless of whether he was provided a copy of the actual arbitration agreement.

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal law that has not been, but should be, settled by this Court (*see* S. Ct. R. 10(c)): whether an arbitration agreement clause in a written document is enforceable against a person when the written document itself was never given to him and the terms therein, including the agreement to arbitrate, were never communicated to him? It is far too common in today's day and age for representatives of corporate giants to force-feed a single signature page from a multipage and multi-part document to individuals for signature without allowing the individual to see the full document at signing, yet alone receiving a full copy of the document for review thereafter.

The Seventh Circuit came to the conclusion that the sole act of Janiga putting his signature on page three of the New Account Form, bound him to the terms of the boilerplate Client Agreement, which includes a mandatory arbitration agreement on another page even though Janiga never saw a copy of the Application, was never given a copy of any part of the Application and could not read the terms of the Application because the terms were written in English, a written language Janiga needs a translator or assistance to understand.

The Seventh Amendment provides that "(i)n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . " *U.S. Const. Amend. VII.* While the constitutionality of mandatory arbitration clauses in agreements is not in question in this matter, the unknowing and involuntary waiver of a person's Seventh Amendment rights is in question in this case.

The Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et seq.*, provides that when a written contract contains an arbitration clause and disputes arise out of such contract, the arbitration provision shall be enforceable "save for grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The FAA thereby places arbitration agreements on an equal footing with other contracts. *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010) citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204 (2006).

The parties are in agreement that since there was an issue as to the making and existence of the alleged contract which contains an arbitration clause, it was proper for the District Court and not an arbitrator to hear and rule on Hessek, Hessek Financial's and Questar's motions to compel arbitration. The Seventh Circuit agreed as well ruling that the District Court was correct – the court must decide whether a contract exists before it decides whether to stay an action and order arbitration. Pet. App. at 13a.

Janiga does not dispute this Court's longstanding rulings that federal policy favors arbitration. However,

the FAA is not an iron fist that demands arbitration in any case where a document contains an arbitration agreement[1]. Sections 2, 3 and 4 of the FAA provide exceptions to the mandatory enforcement of arbitration agreements that apply in this matter, one of which is agreements that are defective in creation. 9 U.S.C. §2, 3 and 4.

When considering Questar's Motion to Compel, the District Court, pursuant to Section 3 of the FAA, considered those issues regarding the making and performance of the Application. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). When a court must decide whether the parties agreed to arbitrate a certain matter, such court is to apply ordinary state-law principals that govern the formation of contracts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Under Illinois law, it is the objective manifestation of intent which controls whether the parties to this case agreed to arbitrate. *Caporale v. Mar Les, Inc.*, 656 F.2d 242, 244 (7th Cir. 1981). Illinois law should apply in this

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1. In fact, Justice Black in his dissent in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) went to great lengths in discussing the legislative history of the United States Arbitration Act of 1925 (now the FAA). He stated that Senator Walsh of Montana, during hearings on the bill, said "the court has got to hear and determine whether there is an agreement of arbitration, undoubtedly, and it is open to all defenses, equitable and legal, that would have existed at law." *Id.* at 413. Justice Black further noted that a representative of one of the chambers of commerce in favor of the bill "assured the Senate subcommittee that the constitutional right to jury trial is adequately safeguarded by the Act." *Id.*

case as it is the law of the State where Janiga objected to arbitrability. Even if New York law applies (as New York law is the choice of law in the Client Agreement) or if Minnesota law applies (as Minnesota law is the choice of law in the arbitration clause in the Client Agreement), New York state law and Minnesota state law mirror Illinois state law in its requirement that Courts look to the objective manifest intention of the parties whether the parties agreed to arbitration as demonstrated through objective conduct. *Janiga v. Questar*, Pet. App. 14a-15a., citing *Carey v. Richards Bldg. Supply Co.*, 856 N.E.2d 24, 27 (Ill. 2006); *Flores v. Lower E. Side Serv. Ctr.*, 828 N.E.2d 593, 597 (N.Y. 2005); *Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 370 n.7 (Minn. 2005).

The District Court, after considering the briefs of the parties and the aforementioned facts, properly concluded that there was no consent among the parties as to an agreement to arbitrate any disputes among them. The Seventh Circuit circumvented the District Court and summarily concluded:

"The problem for Janiga is that he signed a contract, and that the paper he signed refers to arbitration. Janiga's signature – which he admits was given voluntarily – objectively demonstrated his assent to the contract." Pet. App. 15a. Even though Janiga signed one page of the Application and even though his signature is just below a statement saying the undersigned has read and understood the arbitration agreement contained on another page, this does not mean he agreed to arbitrate any claims. It is undisputed that Janiga never received a copy of the arbitration

agreement and even if he had received a copy of the Application or a portion thereof, he could not have understood any portion, including the arbitration disclaimer language just above his signature because such documents were written in English, a language Janiga cannot read fluently. The Illinois Consumer Fraud and Deceptive Practices Act required Hessek, Hesseck Financial and/or Questar to interpret the Application, if it or any part thereof had been given to Janiga, in Polish and certify the same in order for the arbitration agreement to be binding on Janiga. 815 ILCS 505/2N.

The totality of the facts does not show that the parties had an arbitration agreement or any other agreement for that matter other than an oral agreement for Hessek to open an account to invest Janiga's money. Neither Hessek nor Questar reviewed any terms of the Application with Janiga nor did Hessek or Questar ever give Janiga a copy of the Application. Hessek knew his brother could not read English and yet did nothing to explain what he was asking Janiga to sign. Hessek repeatedly told Janiga that Hessek would take care of everything. These facts are not disputed. Hessek's actions fail to establish that any contract was created, especially a contract containing an arbitration agreement. As the District Court properly pointed out, "Janiga acknowledges that he entered into an Agreement to open a brokerage account, but he doesn't acknowledge that he entered into an Agreement that contained an arbitration provision." The District Court also observed that given Janiga's lack of English skills, Hessek and Questar had a fiduciary obligation to Janiga to ensure Janiga understood what he was signing, presumably either by translation or through giving Janiga a copy.

Illinois law clearly states that since Hessek and Janiga conducted business in Polish, especially discussions relating to Janiga investing money with Hessek and Quester, Hessek and Questar were required to interpret into Polish any agreement Janiga was asked to sign. 815 ILCS 505/2N.

This Court has repeatedly concluded that parties cannot be compelled to arbitrate claims if the parties have not agreed or made a bargain to arbitrate. *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 521 (2000); *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 1652 (1991). The Seventh Circuit has thrown out the basic requirement of consent of the parties in contract formation and condoning the financial industry's tactics of forcing customers to "sign here" to open accounts without giving a customer a chance to review any paperwork, yet alone give the customer a copy of any paperwork after execution. This is not a case whereby a customer was given paperwork, the customer objects to signing the paperwork due to the inclusion of an arbitration clause and is told to take it or leave it, as is sadly customary in the industry. This is a case whereby the customer did not even have an opportunity to understand what he allegedly bargained. The Seventh Circuit's ruling tells all of corporate America that it does not need to produce a copy of any agreement to a customer because as long as a company obtains a customer's signature anywhere on a document, even if only on a signature page, the customer is bound to any and all terms therein, including the unknowing waiver of a Constitutional right to a trial by jury. This Court must correct the error of the Seventh Circuit and hold

the financial industry to the simple yet long settled premise that its customers cannot be not bound to the terms of a contract, including an arbitration agreement clause, unless such terms are communicated to the customer. Janiga does not ask this Court to create new precedent, he simply asks this Court to ensure current law is enforced.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully Submitted,

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